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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

Date: **MAY 08 2013** Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as an implementation manager. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of experience stated on the labor certification. Specifically, the director determined that the claimed experience was not listed on the labor certification. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 21, 2012 denial, the primary issue in this case is whether the beneficiary possessed the minimum level of experience stated on the labor certification and as required by the advanced degree professional visa category.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference,

the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."² In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent

² Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

degree.” (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Compare 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability”).

The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires a bachelor’s degree, or foreign educational equivalent, in computer science, engineering, or related field, or “any combination of education which equates to a bachelor’s degree” and 60 months of work experience in the alternate occupations of systems analysis or implementation.

The beneficiary set forth his credentials on the labor certification and signed his name, under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary’s education, and elsewhere in the record, he states that he received a Bachelor of Science degree from Osmania University in India, and a Master of Business Administration degree from [REDACTED]

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is “a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions and agencies in the United States and in over 40 countries.” See <http://www.aacrao.org/About-AACRAO.aspx> (accessed April 3, 2013 and incorporated into the record of proceeding). Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” *Id.* In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

According to the login page, EDGE is “a web-based resource for the evaluation of foreign educational credentials” that is continually updated and revised by staff and members of AACRAO. [REDACTED] Director of International Education Services, “AACRAO EDGE Login.” <http://aacraoedge.aacrao.org/index.php> (accessed April 3, 2013 and incorporated into the record of proceeding). In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), a federal district court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), a federal district court upheld a USCIS conclusion that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience. The reasoning in these decisions is persuasive.

EDGE indicates that a three-year Indian Bachelor of Science degree is comparable to three years of university study in the United States. EDGE does not provide an evaluation of the beneficiary's Master of Business Administration degree from The Netherlands, so the AAO will rely on the educational evaluation submitted by the petitioner.

The record contains the following educational evaluation of the beneficiary's credentials:

- An evaluation from [REDACTED] The evaluation is dated August 10, 2007. The evaluation is signed by [REDACTED] The evaluation describes the beneficiary's Bachelor of Science and Master of Business Administration degrees as being the equivalent of a U.S. Bachelor of Business Administration degree.

Based on the submitted educational evaluation, the AAO has concluded that the beneficiary's Bachelor of Science and Master of Business Administration degrees are more likely than not comparable to U.S. bachelor's degree.

Therefore, in order to qualify as a member of the professions holding an advanced degree, the beneficiary must possess the foreign equivalent of a U.S. bachelor's degree *followed by* five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2). In addition, the beneficiary must have possessed the bachelor's degree and five years of experience by the priority date of June 23, 2010, which is the date the labor certification application was received for processing by the DOL. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I. & N. Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). For the reasons discussed hereinafter, the AAO determines that the beneficiary does not have the requisite experience.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(5) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: “The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The beneficiary’s claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary’s experience. *See* 8 C.F.R. § 204.5(g)(1). In accordance with this regulation, the petitioner has submitted a number of work experience letters.

None of the claimed experience was listed on the labor certification, however, despite the instructions to list all jobs the alien has held during the past three years as well as “any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification.” Therefore, the experience letters cannot be used to establish that the beneficiary meets the experience requirements of the labor certification. *See Matter of Leung*, 16 I&N Dec. 12 (Reg. Comm. 1976), as standing for the proposition that “new employment not listed when the labor certification was certified or when the visa petition was filed is not credible for the issuance of an immigrant visa classification.”

On appeal, counsel states that “the paralegal did prepare and enter the experience into the form prior to filing,” but claims that “there appears to have been an error in the electronic transmission of the form.” The fact remains, however, that the record contains no evidence that petitioner listed, or

attempted to list, the beneficiary's employment experience in the ETA Form 9089 that was filed with the DOL on June 23, 2010, and certified by the DOL on October 4, 2010. Moreover, the petitioner fails to offer any explanation for its omission of the alleged work experience from the labor certification when the ETA Form 9089 was signed by counsel, the petitioner, and the beneficiary after certification by the DOL in October 2010. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The salient fact of the labor certification is that it does not list any work experience for the beneficiary. Therefore, the experience letters have no probative value in this proceeding.

Based on the foregoing discussion, the AAO determines that the beneficiary has a "United States baccalaureate degree or a foreign equivalent degree," but does not have the required five years of progressive, post-baccalaureate experience in the specialty. Thus, he does not qualify for preference visa classification under section 203(b)(2) of the Act. Nor does the beneficiary meet the job requirements on the labor certification – specifically, the five years of qualifying experience. The appeal is dismissible on both of these grounds.

Beyond the decision of the director, the petitioner has also failed to establish that the ETA Form 9089 supports the instant Form I-140 filed on November 19, 2010. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires a bachelor's degree, or foreign educational equivalent, in computer science, engineering, or related field, or "any combination of education which equates to a bachelor's degree" and 60 months of work experience in the alternate occupations of systems analysis or implementation. This alternative requirement, "any combination of education which equates to a bachelor's degree," would allow a beneficiary to qualify with less than a bachelor's degree.

Since the minimum requirements, as stated on the ETA Form 9089, do not require the beneficiary to have at least a bachelor's degree, the petitioner has not established that the ETA Form 9089 requires a professional holding an advanced degree; and the appeal must also be dismissed for this reason.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.